IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION.

CRIMINAL APPEAL NO.799 OF 2002

Ankush Shahir Lohar,]
Age 26, R/o Atpadi,]
Dist.Sangli at present]
in Kolhapur Central Prison] Appellant
Kalamba] (Org.Accused)

versus

The State of Maharashtra] Respondent.

Mr.Milind Deshmukh for the appellant.
Mrs.M.H.Mhatre, APP, for the State.

CORAM : D.G.DESHPANDE
SMT.R.S.DALVI, JJ.
DATED : DECEMBER 07, 2006.

JUDGEMENT [PER D.G.DESHPANDE, J.]

1. Heard learned advocate for the appellant/accused and learned APP for the

Respondent/State.

2. The accused, who was held guilty under section 302 of the Indian Penal Code and sentenced to undergo imprisonment for life and also held guilty under section 323 of the Indian Penal Code and sentenced to pay fine of Rs.1000/- by the II Adhoc All.Sessions Judge, Sangli, has filed this appeal challenging his conviction and sentence.

3. According to the prosecution, this accused has committed murder of child Anil Narayan Bhosale by banging his head on floor. PW.3 Indubai Bhosale, who is the mother of deceased Anil, had illicit relations with accused because her husband had abandoned her. She was residing in a chawl of Sakharam Patil. The relatives of Indubai from her maternal side did not like these relations. Therefore there used to be quarrels. On 1st May 2001, in the afternoon between 15.30 and 15.45 p.m. the accused came in a drunken condition. He quarrelled with Indubai, beat her and went away. After one hour again he came back and started beating her. At that time, her son Anil, who was

aged about 7-8 years, told the accused that he would made complaint to his grandmother i.e. the mother of Indubai. The accused got enraged. He caught hold of the legs of Anil and banged his head on the floor twice. This is the incident alleged against the accused.

4. Thereafter Anil was taken to Rural Hospital, Atpadi and then police report was lodged. Anil was referred to Civil Hospital, Sangli and he died there after two days. The trial Court believed the case of prosecution and convicted the accused as stated above and, hence this appeal.

5. The counsel for the accused made two submissions. Firstly, according to him, the evidence on record does not conclusively prove that the accused has committed murder of Anil. There were infirmities in the information of the eye witnesses and, therefore, the accused was entitled for acquittal. Alternatively, he submitted that in any case, the offence made out against the accused would not be under section 302 of the Indian Penal Code but it would be under Section 304 Part II of the Indian Penal

Code.

6. On the other hand, the learned APP for the respondent/State contended that there were two eye witnesses to the incident. Their evidence was consistent with the guilt of the accused. She further contended that the trial Court has properly appreciated the evidence and convicted the accused and, therefore, there was no reason to interfere with the order of conviction. Regarding applicability of section 304 Part II of the Indian Penal Code, she contended that even if that sections applies to the instant case, the punishment should be severe because a boy of 7/8 years has been brutally killed.

7. Important witness is the P.W.3 - Indubai Narayan Bhosale, who is the mother of deceased Anil. She has admitted that she had illicit relations with the accused and her husband had abandoned her. She has stated that on the date of incident the accused came in drunken condition at about 1.00 p.m., beat her and went away. He returned back again after one hour and at that

time also he beat her. Anil - the deceased son of this witness, was present. He told the accused that he would call his grandmother. The accused told him that he would kill Anil if he calls his grandmother and thereafter the accused caught hold of the legals of Anil and banged his head on the floor. This witness Indubai has stated how Anil was taken to different hospitals and has further stated that the accused beat her by one blow pipe (Article 1) and piece of wood (Article 2).

. In the cross examination, she has stated that the accused was addicted to liquor even before she came to know him. She further admitted that after consuming liquor, the accused used to loose his sense. She has stated that the accused beat her for 10 minutes at the second time. She had no bleeding injury and she had blunt trauma and tenderness. She admitted that she did not call anybody for her help. She denied the suggestion that Anil fell down in the scuffle. She admitted that she has not stated to the police that the accused gave threats to kill Anil. It will be clear that there is nothing in the cross examination of this witness to create

doubt about her testimony.

8. Second witness is Sangita Mahadeo Unune (PW 2). She was the neighbourer of Indubai. She was residing at a distance of 10 to 15 feet from the house of Indubai. She has stated that on 1.5.2001 the accused and Indubai had a dispute. The accused went away after the dispute and again came back. He beat Indubai with fists. Anil was there and he told the accused that he would call his grandmother. The accused caught hold of Anil and took him inside the room and dashed his dead on the floor. Thereafter Savitribai came there and Savitribai and Indubai took Anil away and thereafter the Anil died.

. In the cross examination, she has stated that she was not knowing whether the accused was addicted to liquor or not. She denied the suggestion that her knowledge of the incident is hearsay. She was confronted with her police statement wherein there is omission about the facts narrated by her in court that the accused caught hold of Anil and took him inside the room. There is also omission regarding the accused assaulting Indubai with fists. She, however,

admitted in her cross examination that she did not enter the house of Indubai nor questioned anybody about the cause of dispute. Earlier she has stated that she was sleeping inside her house on that day, but in the next breath corrected herself and stated that she was sitting on the steps of her house on that day. She denied the suggestion that nothing is visible from that spot. It is clear from her cross examination that even though there are certain omissions, the evidence given by this witness has not been shaken at all.

9. The next witness of the prosecution is PW 4 Savitri Mane, who is the niece of Indubai and aged about 30 years at that time. She has stated that the accused and Indubai had illicit relations and they used to live like husband and wife. On the date of incident, the accused went to her and told her that he had beaten Indubai. She then went to the house of accused where he started abusing her and questioned her as to why she had come. She was sitting at the door of Sangita Unune, which was in front of the house of accused. Indubai was also there. At about 3 p.m. the accused came there and started beating

Indubai with blow pipe and piece of wood (Articles 1 and 2). Then Anil told the accused that he would call his grand mother and the accused then lifted Anil by his legs and banged his head twice on the floor. Thereafter Anil was taken to hospital; complaint was lodged as per Exhibit 17. She has also stated that Anil was referred to Rural Hospital, Atpadi and from there to Civil Hospital, Sangli where Anil died after two days.

. This witness (PW 4) was confronted in her cross examination with her FIR wherein it is not mentioned that She and Sangita were sitting in front of her door. Similarly, there is no mention that the accused beat Indubai with blow pipe and wooden plank. There is omission about the accused lifting Anil and moving him in a circular motion and dashing his head twice on the floor. Thereafter she has denied all the suggestions. In the cross examination she stated that she was not knowing whether the accused was addicted to liquor. But she stated that he assaulted Anil in her presence under the influence of liquor. Then she stated that there was swelling on the head of Anil and no other

injury was there. She also stated that Indubai had no bleeding injury but had discolouration. She denied the suggestion that she was deposing falsely.

10. These are the three witnesses who are natural witnesses and have given consistent story about the manner in which the accused caused injuries to deceased Anil. So far as medical aspect is concerned, there were in all eight external injuries and two internal injuries on the head of Anil. They are as under:-

External Injuries :

1. Blackish Red Abrasion, over left supra orbital region, 1 cm. x 1 cm.

2. Blackished CLW over left cheek, with six stitches 6 cm x 0.2 cm.

3. Rt.Reho-auricular Haematoma right ear, with echymosis seen above extending over neck. A differed roughly 10 cm x 5 cm.

4. Black Abrasion over left frontal supra

orbital 1 cm x 1 cm.

5. Blackish eccymosis with abrasion behind left ear 4 cm. x 1 cm.

6. Very small abrasion left knee and right knee 0.5 cm x 1cm x 1 cm.

7. Old abrasion over left leg.

8. A small reddish-black abrasion over right supra oribital region 0.5 cm x 0.5 cm.

Internal Injuries :

1. Head : Supra oriculler haematoma under the scalp right temporal region extending over occipital right side all over.

2. Skull : 1. Suture line fracture occipital.

2. Vertical linear fracture, occipital bone joint bone right to middle.

Subarchanoid haemorrhage over frontal region (more on left side). Haemorrhage over right temporal region. Hemorrhage over left temporal region. Menenges ruptured. Laceration over right cerebellar lobe, interior surface.

The age of deceased Anil, as per post mortem report, is 7 years. The aforesaid injuries were anti post mortem and could be caused by hard and blunt object. Dr.Madhav Haribhau Gore (P.W.6) admitted that these injuries are possible if a boy is lifted by holding his legs and dashed against the floor after moving him in circular motion. The cause of death given by the doctor (PW.6) is Comma due to intercranial haemorrhage with fracture of occipital bone and injury to vital organ like right cerebellum. The cross examination of the doctor has not resulted in disproving the case of the prosecution that it is the homicidal death.

11. From all this evidence it is clear that

the prosecution has succeeded in proving that Anil died as a homicidal death. There are no infirmities in the prosecution case and there is nothing to disbelieve the prosecution witnesses discussed above.

12. The learned advocate for the accused relied upon the judgment of the Supreme Court in the case of **Shivappa Buddappa Kolkar alias Buddappagol v. State of Karnataka and others reported in (2004 Cri.L.J.4966)** in support of his alternative submission that in any case, the offence made out against the accused would not be under section 302 of the Indian Penal Code but it would be under Section 304 Part II of the Indian Penal Code. In the case before the Supreme Court the accused caused head injury resulted in depressed fracture of the skull bone and two more injuries. The cause of death, as deposed by P.W.3 in that case, was coma as a result of injury to vital organs viz. brain and lungs. But there was no medical evidence to the effect that Injury No.1 by itself was sufficient to cause instantaneous death or was sufficient in the ordinary course of nature to cause death. Therefore, considering the nature of injuries and

weapons used, the Supreme Court held that the accused could be imputed with the knowledge that the injury was likely to cause death and, therefore, he was convicted under Section 304 Part II of the Indian Penal Code.

13. The aforesaid judgment of the Supreme Court squarely applies to the present case. Admittedly, the accused was already beating Indubai. At that time Anil interfered. No doubt his provocation was very insignificant so also his age, but it may not be possible to hold that the accused had any intention to kill Anil. He definitely had knowledge that if such a boy of tendered age is lifted in such a manner and his head is banged on the floor twice, it is likely to result in death. Therefore We accept the second submission of the defence lawyer that this is not a case falling under Section 302 of the Indian Penal Code. Hence We hold the accused guilty under Section 304 Part II of the Indian Penal Code.

. So far as sentence is concerned, the advocate for the accused contended that the accused was in jail for more than five and half

years and therefore that should be sufficient sentence. In our opinion, looking to the facts and circumstances of the case, the sentence, as proposed by the advocate for the accused, is not adequate and, therefore, We pass the following order :-

:ORDER:

Appeal is partly allowed.

The conviction of the accused under Section 302 of the Indian Penal Code is set aside. He is convicted under Section 304 Part II of the Indian Penal Code and sentenced to suffer R.I. for 8 (Eight) years and to pay fine of Rs.1000/- in default to suffer R.I. for six months.

[D.G.DESHPANDE,J]

[SMT.R.S.DALVI, J]